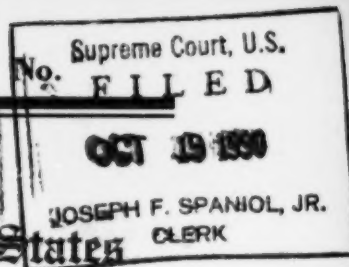


90-642



In The
Supreme Court of the United States

October Term, 1990

1903 OBSCENE MAGAZINES,
Customs Seizure No. 88-0901-00001
and
800 MAGAZINES,
Seizure No. PX 88-56,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Petition for Writ of Certiorari

LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY & CAMBRIA
PAUL J. CAMBRIA, JR., ESQ.
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QUESTIONS PRESENTED

1. Whether goods rejected by the customs officials of a foreign country, to which export is attempted, are imported "from [that] foreign country" within the meaning of Title 19 U.S.C. §1305(a)?
2. Whether the Court of Appeals decision in this case conflicts with the mandate of this Court that a forfeiture statute be strictly construed?

LIST OF PARTIES

As appears in the Court of Appeals decision in this case, the customs seizures in this case were challenged by the Transworld News Company of Cleveland, Ohio.

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THE HISTORY OF THE CITY OF BOSTON

From its first settlement in 1630 to the present time.
By SAMUEL JOHNSON, Esq.
Author of "The Lives of the Presidents of the United States,"
"The Lives of the Secretaries of the Navy," &c.
New York: Published by S. JOHNSON, No. 7, NASSAU ST.
1845.

THE HISTORY OF THE CITY OF BOSTON, from its first settlement in 1630 to the present time. By SAMUEL JOHNSON, Esq. Author of "The Lives of the Presidents of the United States," "The Lives of the Secretaries of the Navy," &c. New York: Published by S. JOHNSON, No. 7, NASSAU ST. 1845.

OPINIONS BELOW

On July 5, 1990, the United States Court of Appeals for the Second Circuit affirmed the United States District Court for the Western District of New York in its denial of motions for summary judgment. That decision is reported at 907 F.2d 1338 and it is reproduced in the appendix at page A-1, *infra*. Thereafter, a petition for rehearing was filed but denied in an order dated August 27, 1990. A copy of that order is reproduced at page A-11.

The decision of the District Court for the Western District of New York is reported at 715 F.Supp. 470 and is reproduced in the appendix at page A-12.

JURISDICTION

The order which affirmed the District Court was entered on July 5, 1990. On August 27, 1990 the Court of Appeals denied the petition for rehearing. Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1254(1) and Rule 13.4 of the rules of this Court.

STATUTORY PROVISION INVOLVED

This case involves the construction of Title 19 U.S.C. §1305. Due to its length, that statute is set forth in its entirety in the appendix at page A-18.

STATEMENT OF THE CASE

The Transworld News Company of Cleveland, Ohio shipped a number of magazines to the North American News of Toronto, Canada. When those shipments arrived at the Canadian border, several thousand of them were rejected by Canadian customs and returned to the United States.

The United States customs service seized the magazines which are the subject matter of this case and instituted forfeiture proceedings under Title 19 U.S.C. §1305(a).

The Transworld News Company of Cleveland, Ohio appeared in the forfeiture action and moved for summary judgment based on the fact that the subject magazines could not have been imported "from a foreign country" as they had never entered the Dominion of Canada. The applicable statute authorizes the forfeiture of obscene matter imported "from any foreign country". 19 U.S.C. §1305(a).

The District Court denied the summary judgment motion with respect to each of the seizures. On September 7, 1989 District Judge Curtin certified his orders denying summary judgment for interlocutory appeal under 28 U.S.C. §1292(b). On November 14, 1989 Judge Curtin ordered the two seizure cases consolidated for appellate purposes.

On July 5, 1990 a panel of the Court of Appeals for the Second Circuit affirmed the District Court. In so ruling, the panel found that goods need not enter a foreign country as a prerequisite to being considered imports from a "foreign country" for forfeiture purposes under Title 19 U.S.C. §1305(a). Specifically, the Second Circuit panel held:

. . . that goods rejected by the customs officials of a foreign country to which export is attempted are imported "from [that] foreign country" within the meaning of §1305(a).

On August 27, 1990 a petition for rehearing with a suggestion for in banc consideration was denied.

REASONS FOR GRANTING THE WRIT

This Court has instructed that,

[f]orfeitures are not favored; they should be enforced only when within both the letter and spirit of the law. *United States v. One 1936 Model Ford*, 307 U.S. 219, 226, 59 S.Ct. 861, 865 (1939).

Several Circuits have expressly adopted that requirement. *United States v. Estevez*, 845 F.2d 1409, 1412 (7th Cir. 1988); *United States v. Certain Real Estate*, 838 F.2d 1558, 1564 (11th Cir. 1988); *United States v. One 1976 Ford*, 769 F.2d 525, 527 (8th Cir. 1985); *United States v. One 1957 Rockwell*, 671 F.2d 414, 417 (10th Cir. 1982); *United States v. One 1977 Cadillac*, 644 F.2d 500, 501 (5th Cir. 1982).

Petitioners readily concede Congress' unlimited power to enact regulatory legislation relating to our national borders. However, Congress expressly opted to exercise more regulatory power in the areas of inspection, search and detention than in the area of forfeiture under 19 U.S.C. §1305(a).

When Congressional intent to broaden the forfeiture power does exist, that intent is expressly manifested. For example, Title 19 U.S.C. §1581 authorizes the forfeiture of merchandise "brought into the United States". 19 U.S.C. §1581(e) (emphasis added). Moreover, that same statute authorizes the forfeiture of a vessel from which merchandise has unlawfully been "introduced into the United States". 19 U.S.C. §1581(g) (emphasis added). Similarly, Title 22 U.S.C. §401(a) authorizes the forfeiture of a vehicle "used in exporting or attempting to export" items in violation of the law.

The panel decision, in this case, improperly grasped upon this Court's decision in *Hooven and Allison Company v. Evatt*, 324 U.S. 652, 65 S.Ct. 870 (1945).

In pertinent part, *Hooven* involved an interpretation of the term "imports" as contained in the Constitutional prohibition against state taxation of goods from abroad. U.S. Const., Art. I, §10, cl. 2. Unlike the statute at issue here, that Constitutional provision does not contain language limiting "imports" to those goods which came "from any foreign country". Moreover, although Title 19 U.S.C. §1305(a) was amended three times after 1945, Congress did not broaden the scope of that statute to comport with the term "imports" as defined by this Court in *Hooven*. Obviously, Congress intended that the power to assess import duties was and should remain greater than the power to implement a forfeiture under the statute at issue here.

It is respectfully submitted that certiorari should be granted not only to resolve the scope of the forfeiture power under §1305(a), but also to establish a proper balance of federalism. We submit that the concept of federalism would be enhanced in this case had the results of the United States Customs Service inspection and detention been shared with local officials in the State of Ohio which was the destination to which the rejected magazines were to be returned. Absent a clear congressional intent to allocate federal resources to implement the forfeiture of such materials, their future should properly be left up to the state from whence they came.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Court grant this petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX

**UNITED STATES of America,
Plaintiff-Appellee,**

v.

1903 OBSCENE MAGAZINES, CUSTOMS SEIZURE NUMBER 88-0901-00001 and 800 Magazines, Seizure Number PX 88/56, Defendants-Appellants.

No. 881, Docket 89-6228.

**United States Court of Appeals,
Second Circuit.**

Argued March 14, 1990.

Decided July 5, 1990.

Magazine distributor brought suit challenging legality of seizure of allegedly obscene magazines at the United States-Canada border. On the distributor's motion for summary judgment, the United States District Court for the Western District of New York, John T. Curtin, J., 715 F.Supp. 470, denied the motions for summary judgment. Distributor appealed. The Court of Appeals, Cardamone, Circuit Judge, held that sexually explicit magazines that were shipped from the United States to Canada, rejected by Canadian customs officials, and returned to the United States were "imported" and subject to seizure under the statute that prohibits the importation of obscene materials into the United States from any foreign country.

Affirmed.

1. Customs Duties — West Key No. 54, 126(1)

Customs Service has plenary power to safeguard United States borders, which includes power to inspect any person or thing that presents itself at border seeking entrance. Tariff Act of 1930, § 581(a), as amended, 19 U.S.C.A. § 1581(a).

2. Customs Duties — West Key No. 54

Customs officials are more than investigative law enforcement officers; they are also charged with protecting this nation from harmful or illegal substances that may gain entrance. Tariff Act of 1930, § 581(a), as amended, 19 U.S.C.A. § 1581(a).

3. Customs Duties — West Key No. 126(2)

Traveler seeking entrance to United States has no Fourth Amendment right to be let alone; his luggage and personal effects may be searched without probable cause and illegal materials that are in his possession may be seized. Tariff Act of 1930, § 581(a), as amended, 19 U.S.C.A. § 1581(a); U.S.C.A. Const. Amend. 4.

4. Customs Duties — West Key No. 14

Goods need not have originated in foreign country or have entered foreign country's stream of commerce in order to be "imported" into the United States and subject to search. Tariff Act of 1930, §§ 305(a), 581(a), as amended, 19 U.S.C.A. §§ 1305(a), 1581(a).

See publication Words and Phrases for other judicial constructions and definitions.

5. Customs Duties — West Key No. 14, 22

Sexually explicit magazines that were shipped from United States to Canada, but had been rejected by Canadian customs officials and presented at United States border for re-entry, were "imported" and subject to seizure under statute prohibiting importation of obscene materials from any foreign country. Tariff

Act of 1980, § 305(a), as amended, 19 U.S.C.A. § 1305 (a).

Joseph M. Latona, Buffalo, N.Y. (Paul J. Cambria, Jr., and Cherie L. Peterson, Lipsitz, Green, Fahringer, Roll, Schuller & James, Buffalo, N.Y., of counsel), for defendants-appellants.

Martin J. Littlefield, Asst. U.S. Atty., W.D.N.Y., Buffalo, N.Y. (Dennis C. Vacco, U.S. Atty., W.D.N.Y., Buffalo, N.Y., of counsel), for plaintiff-appellee.

Before KEARSE, CARDAMONE and MAHONEY, Circuit Judges.

CARDAMONE, Circuit Judge:

This appeal requires us to interpret the meaning of the words "from any foreign country." The question arises in a commercial setting between Trans World News of Cleveland, Ohio (Trans World) and North American News of Toronto, Canada (North American), two companies that have been doing business with each other for over 20 years. In the instant case Trans World shipped nearly 70,000 magazines to Canada. When the shipment reached the Canadian border more than 10,000 of them were rejected as sexually explicit material, offensive to Canadian standards. Upon return of the magazines to the United States, Customs officials seized 2,703 of them after determining there was probable cause to believe they were obscene under standards in the Western District of New York.

Business as usual between these two companies is plainly acknowledged to be, at least in part, a "dirty" business since the possibility that these titles would not clear customs was recognized by the open account between them. A bill is sent along by Trans World with the shipment, but if the goods do not clear customs, a credit is issued. Not only did the offensive magazines fail

to clear both Canadian and United States Customs, they were later seized pursuant to the Tariff Act of 1930 § 305(a), as amended, 19 U.S.C. § 1305(a) (1988) (Act), which prohibits the importation of obscene materials into the United States from any foreign country, and forfeiture proceedings were instituted against them by the United States government.

Trans World, the shipper, appeared and answered, challenging the seizures. It alleges that the Act has no application to this shipment because having been refused entry into Canada, it never "entered" that country. Hence, the magazines could not later be "imported" into the United States "from a foreign country." Thus, the meaning of these terms is critical to a resolution of this appeal.

FACTS

The facts are undisputed. Three shipments of magazines were made by Trans World from Cleveland, Ohio to North American in Toronto, Canada. The first shipment consisting of 25,525 sexually explicit magazines was made on July 23, 1987. A second shipment of 26,258 of the same kind of magazines was dispatched on September 4, 1987. When Canadian Customs officers examined these two shipments they determined that a total of 5,603 magazines were offensive by Canadian standards and ordered them returned to the United States. Seven hundred of these magazines were held by Canadian Customs for more than three weeks; 1208 others were held in excess of two months. North American returned the rejected publications to the United States, addressed to Trans World, in boxes marked "American Goods Refused Being Returned" and "Refused Entry."

United States Customs officials inspected the returned goods when they arrived at the border. They determined that there was probable cause to believe that 1,908 of the magazines were obscene, and confiscated them. The United States later filed an *in*

rem forfeiture complaint on October 6, 1987 alleging that the magazines were obscene. *United States v. 1903 Obscene Magazines, Customs Seizure No. 88-0901-00001*, No. 87-1304C (W.D.N.Y. Oct. 6, 1987).

A third shipment consisting of 17,684 magazines was trucked from Trans World to North American on October 1, 1987. After being in Canadian Customs' custody for almost four months, Canadian Customs refused entry to 4,634 magazines that were then returned by North American to Trans World, as consignee. Upon arrival at the United States border on January 29, 1988, United States Customs determined that there was probable cause to believe 800 of them were obscene and seized them. A forfeiture complaint against the 800 magazines was filed February 1, 1988. *United States v. 800 Magazines, Seizure No. PX 88/56*, No. 88-120C (W.D.N.Y. Feb. 1, 1988).

Trans World, the distributor of the magazines, as claimant, filed an answer in each of the two cases contesting the legality of the seizure at the United States border. It moved for summary judgment in each case asserting the magazines were not subject to seizure because they were not being "imported" into the United States "from a foreign country" within the meaning of the Act.

The cases came before Judge Curtin of the United States District Court for the Western District of New York, who denied claimant's motions for summary judgment in a June 20, 1989 opinion and order. He held that goods need not be exported from another country before they can be considered to be imported into the United States under the terms of the Act. "[B]ecause the magazines ... had crossed the United States border, they were properly seized as imports under the Act upon their return." *1903 Obscene Magazines*, 715 F.Supp. 470, 472 (W.D.N.Y.1989). Pursuant to 28 U.S.C. § 1292(b) (1988), Judge Curtin certified his interlocutory order for appeal on September 7, 1989, and on November 14,

1989 ordered the two cases consolidated. We affirm the district court's denial of appellant's motions for summary judgment.

DISCUSSION

A.

[1, 2] The formidable task of protecting the integrity of our national borders has been delegated by Congress to the executive branch under a broad grant of authority. See *United States v. Ramsey*, 431 U.S. 606, 616-17, 97 S.Ct. 1972, 1978-79, 52 L.Ed.2d 617 (1977). The United States Customs Service has plenary power to safeguard the United States borders, which includes the power to inspect any person or thing that presents itself at a border seeking entrance. See 19 U.S.C. § 1581(a) (1988); *Carroll v. United States*, 267 U.S. 132, 154, 45 S.Ct. 280, 285, 69 L.Ed. 543 (1925) ("Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in."). Customs officials are more than investigative law enforcement officers; they are also charged with protecting this Nation from harmful or illegal substances that may gain entrance. See *United States v. Montoya de Hernandez*, 473 U.S. 531, 544, 105 S.Ct. 3304, 3312, 87 L.Ed.2d 381 (1985); see also *Alexander v. United States*, 362 F.2d 379, 382 (9th Cir.), cert. denied, 385 U.S. 977, 87 S.Ct. 519, 17 L.Ed.2d 439 (1966).

[3] Importation of obscene materials is prohibited by 19 U.S.C. § 1305(a):

All persons are prohibited from importing into the United States from any foreign country ... any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral.... No such article

les whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles ... shall be subject to seizure and forfeiture....

Trans World does not claim that the Customs officers lacked authority to search the boxes of magazines presented at the border. Such searches are clearly permissible. Thus, a traveler seeking entrance to the United States has no Fourth Amendment right to be let alone, his luggage and personal effects may be searched without probable cause, and illegal materials that are in his possession may be seized. See *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 376, 91 S.Ct. 1400, 1408, 28 L.Ed.2d 822 (1971).

What claimant contends is that § 1305(a) does not authorize seizure of the subject magazines because the statute is narrowly drawn to authorize seizure only of "import[s] ... from any foreign country." And, to repeat its argument, because the magazines were refused entry into Canada from the United States they were not upon their return imported into the United States from a foreign country within the meaning of the Act.

B.

[4] Much of the case law interpreting the term "import" has its genesis in the Constitution's treatment of the power of taxation. Article I, § 10, cl. 2 of the Constitution provides that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws...." The power to lay and collect import duties, of course, was conferred on Congress. U.S. Const. Art I, § 8, cl. 1. The framers feared that international commerce would be burdened if goods were subjected to unequal taxation by the various states. Yet, the law has always been that after importation becomes complete and the goods enter the

stream of goods within a state, the state has the undoubted right to tax them. *See Brown v. Maryland*, 25 U.S. (12 Wheat. 419) 266, 278-80, 6 L.Ed. 678 (1827).

As a consequence, in sorting out the right of Congress and the right of individual states to tax goods the definition of the word "import" had significance from the early days of our Republic. Chief Justice Marshall, for example, said that imports are "the articles themselves which are brought into the country." *See id.* 25 U.S. at 277. Consistently, it was later held that importation "consists in bringing an article into a country from the outside." *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122, 43 S.Ct. 504, 507, 67 L.Ed. 894 (1923). Webster's Third New International Dictionary (1981 ed.) defines import as "to bring ... into a place or country from another country." *Id.* at 1135.

It seems plain from this brief recitation that none of the sources using the word "imports" refer to their foreign origin. As the Supreme Court has observed, because most imports do originate from a foreign country courts have tended to refer to imports in that fashion, *see Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 669, 65 S.Ct. 870, 879, 89 L.Ed. 1252 (1945), with support from the dictionary — which adds to the earlier definition — "to bring from a foreign or external source." To resolve this somewhat ambiguous situation, the Supreme Court in *Hooven* held that goods that come into this country from a place without — though not of foreign origin — are imports in the constitutional sense. *See id.* at 671, 65 S.Ct. at 880.

The immunity of the goods from state taxation — the history of which has been alluded to — until the goods can fairly be said to have entered the state's stream of taxable property is an important aspect of the *Hooven* holding, *see id.* at 667-68, 65 S.Ct. at 878, because it resolves the tension between federal and state taxing power. That concept does not support appellant's proposition that the goods in question must first have entered into Canada's

mass of property — rather than resting in a warehouse — in order to be subject later to United States import duties or seizure. This argument might have merit were this litigation between a state and the federal government, but this view is wholly misplaced in the present setting. Further, it has been held that goods need not have entered a foreign country's stream of commerce in order to be imported within the meaning of § 1305(a). *See United States v. Various Articles of Obscene Merchandise, Schedule No. 2098*, 536 F.Supp. 50, 52 (S.D.N.Y.1981) (video cassettes of movies purchased in the United States and mailed to Germany were imported when mailed back to the United States); *United States v. Eight Reels of Film*, 491 F.Supp. 129, 131-32 (W.D.Tex.1978) (importation occurred when films were taken out of the U.S. into Mexico in the trunk of a car, remained in the trunk and were returned to the U.S.), *aff'd mem.*, 620 F.2d 299 (5th Cir.1980).

C.

[5] Turning to the facts in this case, the magazines were clearly exported from the United States when they were shipped from Cleveland to North American in Toronto with the intent that they remain in Canada. *See* 19 C.F.R. § 101.1(k) (1989); *Swan & Finch Co. v. United States*, 190 U.S. 143, 145, 23 S.Ct. 702, 703, 47 L.Ed. 984 (1903). After Canadian Customs rejected the shipment, the magazines were presented at the United States border for re-entry. Whether the magazines were accepted into Canada or denied entry and held by Canadian Customs is irrelevant. Regardless of their fate in Canada the objectionable publications were presented at the United States border for entry into the United States from without when they were seized.

Existing case law supports the conclusion that an importation occurred. We have previously ruled that the point of origin is immaterial to whether there was an importation within the meaning of § 1305(a). *United States v. Various Articles of Obscene*

Merchandise, Schedule No. 2127, 705 F.2d 41, 42 n. 2 (2d Cir.1983) (magazines purchased in the U.S. and taken abroad were considered imported when shipped back to the U.S.). In *United States v. 10,000 Copies New York Nights*, 10 F.Supp. 726 (S.D.N.Y.1935), a case quite similar to this one, material refused entry into England was seized pursuant to § 1305(a) upon its return to the United States. *Id.* at 727. The court there stated that importation had occurred despite the fact that the goods were present in Britain only under the custody of British Customs. *Id.* at 728-29. Although the goods in *New York Nights* were "presumptively entered" into Great Britain pursuant to British law, *id.* at 727, this is a distinction that makes no difference in the result. See *Hooven*, 324 U.S. at 670, 65 S.Ct. at 879.

Moreover, construing § 1305(a) to prohibit seizure of contraband at the border when the material failed to clear customs at the country to which export was attempted would unreasonably impair United States Customs from effectively functioning as a law enforcement agency. It is absurd to suppose that the Customs officer may lawfully search and inspect materials presented at the border, but upon discovering material that appears to be contraband, must let it pass unless it was at one time introduced into the commerce of a foreign country.

Consequently, we hold that goods rejected by the Customs officials of a foreign country to which export is attempted are imported "from [that] foreign country" within the meaning of § 1305(a).

CONCLUSION

The order of the district court denying Trans World's motions for summary judgment is accordingly affirmed.

United States Court of Appeals

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-seventh day of August, one thousand nine hundred and ninety

UNITED STATES OF AMERICA,

Appellee,

v.

DOCKET NUMBER

1903 OBSCENE MAGAZINES,
CUSTOMS SEIZURE NUMBER
88-0901-0001 and 800 MAGAZINES,
Seizure Number PX 88/56.

89-6228

Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellants

1903 OBSCENE MAGAZINES

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

[Signature]

ELAINE B. GOLDSMITH
Clerk

UNITED STATES of America, Plaintiff,

v.

**1903 OBSCENE MAGAZINES, CUSTOMS SEIZURE
NUMBER 88-0901-00001, Defendant.**

UNITED STATES of America, Plaintiff,

v.

**800 MAGAZINES, SEIZURE NUMBER
PX 88/56, Defendant.**

Nos. Civ-87-1304C, Civ-88-120C.

United States District Court, W.D. New York.

June 20, 1989.

Magazine distributor challenged legality of seizure of allegedly obscene magazines by United States Customs officials at United States-Canada border. Magazine distributor moved for summary judgment. The District Court, Curtin, J., held that allegedly obscene magazines, which were transported from United States to Canada, but which had to be returned to United States upon denial of entry by Canadian customs officials, were properly seized as imports under Tariff Act upon their return to United States.

Motions denied.

1. Customs Duties — West Key No. 14

Allegedly obscene magazines, which were transported from the United States to Canada, but which had to be returned to United States upon denial of entry by Canadian customs officials, were

properly seized as "imports" under Tariff Act upon their return to United States. Tariff Act of 1930, § 305(a), 19 U.S.C.A. § 1305(a).

See publication Words and Phrases for other judicial constructions and definitions.

2. Customs Duties — West Key No. 22

Tariff Act does not require that allegedly obscene goods be exported from another country before they can be "imported" and thus seized by United States Customs officials under the Act. Tariff Act of 1930, § 305(a), 19 U.S.C.A. § 1305(a)

Dennis C. Vacco, U.S. Atty. (Martin J. Littlefield, Asst. U.S. Atty., of counsel), Buffalo, N.Y., for plaintiff.

Lipsitz, Green, Fahringer, Roll, Schuller & James (Paul J. Cambria, and Fern S. Adelstein, Joseph Latona, of counsel), Buffalo, N.Y., for defendant.

BACKGROUND

CURTIN, District Judge.

Currently pending before the court are two motions for summary judgment by claimant Trans World News, Inc. The claimant is the distributor of the magazine at issue in these two cases, and is challenging the legality of their seizure by United States Customs officials at the United States-Canada border.

FACTS

The relevant facts can be summarized briefly. In July, September, and October of 1987, a total of three shipments of magazines destined for Toronto were dispatched by truck from Cleveland, Ohio. After the magazines were brought into Canada, they were examined by Canadian Customs officials who refused to allow

some of them to enter the country. These magazines were subsequently brought back to the United States, where U.S. Customs officials, after determining that they were obscene, seized the 2,703 magazines at issue while they were being held at warehouses maintained by the Customs Service. It appears that 1,903 of the magazines were seized on or about September 20, 1987, at the Lewiston Warehouse in Lewiston, New York, and that the remaining 800 were seized on or about January 29, 1988, at the Peace Bridge Warehouse in Buffalo, New York.

DISCUSSION

[1, 2] The Tariff Act of 1930 ("Act") provides in relevant part:

All persons are prohibited from importing into the United States from any foreign country ... any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral ... No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry

19 U.S.C.A. § 1305(a) (Supp.1989). The claimant contends that the magazines at issue were not subject to seizure because they were not being "imported" within the meaning of the Act. The claimant argues that because the magazines never actually "entered" Canada, they were not being exported" from Canada when the truck returned to the customs station on United States' soil. If the magazines were not being exported from Canada, the claimant reasons they were not being imported into the United States when the truck returned. Item 9 at ¶¶ 9-18; Item 13 at ¶¶ 9-18.

In *United States v. Various Articles of Obscene Merchandise*, Schedule No. 2127, 705 F.2d 41 (2d Cir.1983), U.S. Customs Officials seized a shipment of allegedly pornographic magazines in

New York City. The claimant in that case argued that the magazines had not been imported within the meaning of the Act because they had been purchased in the United States, had been brought to Germany while the claimant pursued his studies, and had merely been shipped back to the United States. The United States Court of Appeals for the Second Circuit rejected his argument, holding that "[t]his is an in rem action and any obscene materials brought into this country, regardless of their point of origin, are subject to seizure under 19 U.S.C. § 1305(a)." *Id.* at 42 n. 2.

The Second Circuit cited two cases in support of its holding — *United States v. Various Articles of Obscene Merchandise, Schedule No. 2098*, 536 F.Supp. 50 (S.D.N.Y.1981), and *United States v. Eight Reels of Film*, 491 F.Supp. 129 (W.D.Tex.1978), *aff'd*, 620 F.2d 299 (5th Cir.1980). In *United States v. Various Articles of Obscene Merchandise, Schedule No. 2098*, a video club run by American servicemen in Germany purchased videotapes by mail from the United States. The claimant, an officer who was president of the club, taped hundreds of the movies, some of which were obscene, and mailed them to himself in New Jersey, but the films were seized in New York before they could be delivered. In *United States v. Eight Reels of Film*, obscene films were seized from the claimant's car as she attempted to enter the United States from Mexico. According to the claimant, she had purchased the films in Texas, had inadvertently left them in the car's trunk, and had never removed them from the car while she was in Mexico. In each case, the court considered and rejected the contention that the films were not covered by the Act because they originated in the United States. See 536 F.Supp. at 52; 491 F.Supp. at 131-32.

The parties have cited one other case as relevant to the issue at bar. In *United States v. 10,000 Copies New York Nights*, 10 F.Supp. 726 (S.D.N.Y.1935), a shipment of allegedly obscene magazines entered Great Britain, where it was inspected by Brit-

ish authorities who subsequently returned it to New York. The claimant argued that the Act did not cover the magazines because they were merely American goods that were being "returned," and, consequently, were not imports. The court, rejecting the claimant's argument, found that once the goods reached the United States it was proper to initiate libel proceedings pursuant to the Act. *Id.* at 727-29.

None of these cases addresses the precise issue presently before the court. Here, the goods were transported from the United States across an international border, but their entry was denied by foreign customs officials.

Yet the claimant's reliance on the fact that the goods here had been denied entry by Canadian officials is misplaced. None of the cases discussed above turned on the fact that the goods had technically "entered" another country; rather, it appears that the dispositive consideration in each case was the fact that the merchandise in question had crossed the United States' border. For example, the claimant attempts to distinguish *United States v. 10, 000 Copies New York Nights* by pointing out that the goods in that case had been imported into Great Britain before being returned to the United States. Item 9 at ¶¶ 16-17; Item 13 at ¶ 16-17. But the court in that case noted that, under British law, "entry *had* to be made" before the merchandise could be examined by the British authorities. 10 F.Supp. at 728 (emphasis added). Indeed, the court referred to the goods as having been merely "presumptively entered" into Great Britain. *Id.* at 727. It is thus clear that the court considered importation to be of no great consequence to the question of statutory interpretation before it.

In short, contrary to the claimant's argument, the Act does not require that goods be exported from another country before they can be imported pursuant to the Act.

Accordingly, because the magazines at issue here had crossed the United States border, they were properly seized as imports under the Act upon their return. The claimant's motions for summary judgment, therefore, are denied.

So ordered.

§ 1305. Immoral articles; importation prohibited**Prohibition of Importation**

(a) All persons are prohibited from importing into the United States from any foreign country any book, pamphlet, paper, writing, advertisement, circular, print, picture, or drawing containing any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States, or containing any threat to take the life of or inflict bodily harm upon any person in the United States, or any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral, or any drug or medicine or any article whatever for causing unlawful abortion, or any lottery ticket, or any printed paper that may be used as a lottery ticket, or any advertisement of any lottery. No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the appropriate customs officer that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: Provided, That the drugs hereinbefore mentioned, when imported in bulk and not put up for any of the purposes hereinbefore specified, are excepted from the operation of this subdivision: Provided further, That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the appropriate customs officer to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of such customs officer. Upon the seizure of such book or matter such customs officer shall transmit information thereof to the United States attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

(b) Repealed. June 25, 1948, c. 645, § 21, 62 Stat. 862. June 17, 1930, c. 497, Title III, § 305, 46 Stat. 688; June 25, 1948, c. 645, § 21, 62 Stat. 862; June 25, 1948, c. 646, § 1, 62 Stat. 869; June 2, 1970, Pub.L. 91-271, Title III, § 301(a), 84 Stat. 287; Jan. 8, 1971, Pub.L. 91-662, § 1, 84 Stat. 1973.